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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ANDREA BARTELAMIA, an individual, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION, a Minnesota corporation, as trustee for the RMAC TRUST, SERIES 2016-CTT, and QUALITY LOAN SERVICE CORPORATION, a Washington State corporation, Defendants.	Case No. 3:23-cv-00877 PLAINTIFF'S MEMORANDUM IN SUPPORT OF A PRELIMINARY INJUNCTION ORAL ARGUMENT REQUESTED

MOTION

Pursuant to FRCP 65, Plaintiff Andrea Bartelamia ("***Plaintiff***") requests that the Court enter a preliminary injunction (the "***Order***"), continuing the previously granted Temporary Restraining Order (the "***TRO***") for the duration of the pendency of this action. The Order should enjoin Defendants U.S. Bank National Association ("***U.S. Bank***") and Defendant Quality Loan Service Corporation, ("***QLS***," and, together with U.S. Bank, the "***Defendants***") from selling, injuring, destroying, transferring, removing, concealing or otherwise disposing (together, "***Transferring***" or the "***Transfer***") the real property located at 21975 SW 65th Ave., Tualatin, Oregon (the "***Property***") in any form, including by means of a foreclosure sale. The Court has set

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oral argument on this matter on June 26th, 2023 at 10:00 AM. Plaintiff estimates that the time required for oral argument will be one hour. Official court reporting services are requested.

In support of the request for entry of a preliminary injunction, Plaintiff relies on the Declaration of Andrea Bartelamia [ECF 4] (the "***Bartelamia Decl.***"). Plaintiff also relies on the Supplemental Declaration of Andrea Bartelamia (the "***Supp Decl.***") and the Declaration of Nicholas J. Henderson (the "***Henderson Decl.***") filed with this Memorandum.

BACKGROUND

Plaintiff has lived her entire life at the Property, and now holds legal title to it. Supp. Decl. ¶¶ 3-5, 8. The Property is encumbered by a Deed of Trust dated December 29, 2004, by Adelheid Lee, also known as Heidi Lee ("***Grantor***"), as Grantor, Transnation Title Insurance Company, as Trustee, and GreenPoint Mortgage Funding, Inc. ("***GreenPoint***"), as Beneficiary, recorded in Washington County on January 5, 2005, as Recording No. 2005-001260 (the "***Deed of Trust***"). Complaint ¶ 2; Supp. Decl. ¶ 6.

The beneficial interest of the Deed of Trust has been assigned from GreenPoint to U.S. Bank. QLS has been appointed as successor trustee. Complaint ¶¶ 3, 4; Supp. Decl. ¶ 6. The Deed of Trust was given by the Grantor to secure a loan in the amount of $320,000 (the "***Loan***"). Complaint ¶ 5; Supp. Decl. ¶ 6.

The Grantor stopped making payments on the Loan and defaulted on June 1, 2008. Complaint ¶¶ 8, 18; Supp. Decl. ¶ 8. Because of that default, Defendants' predecessors-in-interest accelerated the Loan before the Grantor's filing of bankruptcy on October 8, 2008. Complaint ¶¶ 7, 8, and 21; Bartelamia Decl. ¶ 10.

For the last fourteen years, Defendants and their predecessors in interest have been threatening foreclosure, commencing and then cancelling nonjudicial foreclosure sales, initiating and then dismissing judicial foreclosures, and generally threatening to take back the Property through some sort of foreclosure mechanism. Complaint ¶¶ 10-17; Supp. Decl. ¶ 9.

In early 2023, Defendants announced their latest foreclosure effort: a non-judicial sale

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following the recording a Notice of Sale and Election to Sell in the Washington County real property records, as Recording No. 2023-004429. Complaint ¶ 18; Supp. Decl. ¶ 12. On June 6, 2023, the Plaintiff filed her Complaint in State Court requesting declaratory relief to protect her possessory rights in the Property. She specifically asked the Court to find that the Deed of Trust has been satisfied and discharged under the statute of limitations, ORS 88.110. Complaint ¶¶ 22-23; Bartelamia Decl. ¶ 12. The Plaintiff's claims in Complaint are straightforward: the Defendants have had nearly fifteen years to act on their rights, but the time to do so has now passed, and they can no longer seek to take the Property back.

After the Complaint was filed in state court, Plaintiff prepared a motion for a temporary restraining order to stop the immediate sale of the property, and seeking an injunction preventing the sale from occurring during the pendency of the litigation. Henderson Decl. at ¶ 3. After Plaintiff's counsel informed Defendant's counsel of their intent to move for a temporary restraining order, Defendants removed the case to this court, necessitating a temporary restraining order in this Court on an emergency basis. *Id.* at ¶ 4.

LEGAL STANDARD

The primary function of a preliminary injunction "is to preserve the status quo pending a final determination of the rights of the parties.", in order "to preserve the power to render a meaningful decision on the merits," *Resolution Tr. Corp. v. Cruce*, 972 F2d 1195, 1198 (10th Cir 1992) (citations omitted). Evaluating the merits of a preliminary injunction "is often a delicate and difficult balancing act, with complex factual scenarios teed up on an expedited basis, and supported only by limited discovery." *All. for the Wild Rockies v. Cottrell*, 632 F3d 1127, 1139 (9th Cir 2011) (Mosman J., concurring)

In determining whether to grant injunctive relief prior to trial, the Court must consider four factors: (1) the movant's likelihood of success in the underlying dispute between the parties; (2) whether the movant will suffer irreparable injury if the injunction is not issued; (3) the injury to the non-moving party if the injunction is issued; and (4) the public interest. *Winter v. Natural*

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Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008).

The Ninth Circuit, as well as others, have historically evaluated the four preliminary injunction factors on a sliding scale, finding that a strong showing on one of the four elements can compensate for a weaker showing on other elements. *All. for the Wild Rockies* at 1131. The Supreme Court in *Winter* eliminated that historical flexibility as to irreparable injury, but left it unchanged as to the likelihood of success. *Id.* at 1131–32. There are good reasons to take a firm line with likelihood of irreparable harm and a more flexible line with likelihood of success. "[I]t is not unusual for the parties to be in rough agreement about what will follow a denial of injunctive relief." *Id.* at 1139 (Mosman J., concurring). Because the matter proceeds on an expedited schedule without the benefit of discovery, as it does in this case, "[t]he parties are often mostly guessing about important factual points that go, for example, to whether a statute has been violated, whether a noncompetition agreement is even valid, or whether a patent is enforceable." *Id.* Likelihood of success is less clear early in the case, without the benefit of discovery and comprehensive briefing, while the irreparability of the harm should be much more apparent.

The test in the Ninth Circuit is now firmly established post-*Winter*: where there are "serious questions going to the merits" and a balance of hardships that tips sharply toward the plaintiff, a preliminary injunction is appropriate, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

As discussed below, the Plaintiff's evidence demonstrates that all four factors weigh heavily in Plaintiff's favor. Even if there was some doubt as to the Plaintiff's likelihood of success on the merits, at this stage, there are serious questions going to the merits which support the entry of the Order.

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ARGUMENT

1. Plaintiff will suffer irreparable injury without a preliminary injunction.

Like in *Alliance for the Wild Rockies*, irreparable injury is not reasonably in dispute here. ("In this case, for example, the parties agree that more than 1,600 acres would be logged in the absence of an injunction. While they disagree about the implications of the logging—such as the extent of environmental impact or the value of natural recovery—the mere fact of logging is undisputed.") 632 F3d 1127, 1139. Without the Order, the Plaintiff will be permanently and irreparably dispossessed of the Property through foreclosure. Any subsequent decision from this Court declaring the Deed of Trust satisfied and discharged as alleged in the Complaint would be of no practical value because the Property will have been lost. Under these circumstances, issuance of the Order is essential to preserve the status quo and prevent Defendants from taking actions that violate Plaintiff's rights and render ineffectual the relief sought by Plaintiff.

2. The balance of equities and public interest favor Plaintiff.

The court considers the balance of the equities and the public interest together. *D.W. v. Fresenius Medical Care North America*, 534 F.Supp.3d 1274, 1288 (D. Or 2021). In weighing the equities, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id*. (citing *Winter*, 555 U.S. at 24). The court must also consider "whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Id*.

Here, the balance of equites and public interest each favor Plaintiff, because Plaintiff is the only party which stands to suffer harm as a result of the foreclosure sale and the public is not injured by the grant of preliminary relief. Plaintiff stands to be dispossessed of her property from denial of the Order, while harm to Defendants is *de minimis* at best. Defendants have waited 14 years to seriously attempt to enforce its rights under the Deed of Trust, adding unnecessary interest and legal expense to the balance of the loan Defendants now seek to enforce. Waiting for the outcome of this litigation to determine the parties' rights does not materially add to the time

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that Defendants have already wasted through inaction. The potential harm to Plaintiff is specific and direct. The potential harm to Defendants is ambiguous and speculative. When the outcome is probable harm versus speculative harm, the balance of equities favors the party that would suffer probably harm. *See id.* at 1288 (finding the balance of equities favors those who will suffer probable injury over those who will suffer speculative harm.)

3. Serious questions go to the merits of Plaintiff's claim.

Plaintiff seeks to have the Deed of Trust satisfied and discharged pursuant to Oregon law. Complaint ¶¶ 22-23. Prior to October 8, 2008, Defendants' elected to accelerate the Loan pursuant to applicable clauses in the controlling agreements. Complaint ¶¶ 7, 8, and 21; Bartelamia Decl. ¶ 10. The Notice of Default and Election to Sell filed by the Defendant ins the Washington County Records on September 23, 2010 codified the acceleration of the loan. Bartelamia Decl. Ex. 1 at 2 ("By reason of said default, the beneficiary has declared all sums owing on the obligation secured by said Trust Deed immediately due and payable…."). The Grantor then filed bankruptcy on October 28, 2008 and received her discharge on February 2, 2009. *See In re Adelheid Maria Scott* Case 08-35797-rld7 (Bankr. Or.).[1]

ORS 88.110 states that: ". . . no mortgage upon real property shall be a lien upon such property after the expiration of 10 years from the later of the date of maturity of the mortgage debt, the expiration of the term of the mortgage debt or the date to which the payment thereof has been extended by agreement of record; and after such 10 years the mortgage shall be conclusively presumed paid and discharged, and no suit shall be maintainable for its foreclosure." The statute explicitly states that a lien on real property expires 10 years after the later of (1) "the date of maturity of the mortgage debt", (2) "the expiration of the term of the mortgage debt" or (3) "the date to which the payment thereof has been extended by agreement of record". After the 10 year period, "the mortgage shall be conclusively presumed paid and discharged, and no suit shall be maintainable for its foreclosure."

[1] Plaintiff requests that the Court take judicial notice of this fact, which should not be in dispute.

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Item (3), dealing with agreements of record, is not relevant here as there is no agreement of record in existence or alleged. There cannot be any reasonable dispute as to the meaning of (1) and (2), "the date of maturity of the mortgage debt" and "the expiration of the term of the mortgage debt".

The acceleration of the debt, documented in the Defendant's Notice of Default and Election to Sell , starts the 10 year statute of limitations for the purposes of (1). The rule in Oregon is that "[w]here the debt is payable in installments and the instrument contains an automatic acceleration clause, the debt is fully matured and the statute of limitations begins running when the debtor first defaults. [W]here an instrument gives the creditor an election to accelerate maturity of the debt and it is accelerated, the statute of limitations begins to run from the time of the election to accelerate." *Fed. Recovery of WA, Inc. v. Wingfield*, 162 Or. App. 150, 156–57 (1999) (Citing 54 C.J.S. 201, Limitations of Actions, § 153 (1987), later renumbered to 54 C.J.S. 201). The Note and Trust Deed gave the Defendants' the option to accelerate the debt. They exercised that option on September 23, 2010, by recording the Notice of Default and Election to Sell. *See* Bartelamia Decl., ¶ 11; Ex. 1. Therefor the 10-year statute of limitations expired on September 22, 2020.

This is not a novel rule; it is widely accepted in a majority of state and federal courts. *See U.S. Bank National Association v. Bernice 380 Corp*., 186 A.D.3d 1750, 130 N.Y.S.3d 515 (2d Dep't 2020) ("Even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt."); See also *First Commerce, LLC, v. Sheck Gaming, Inc*., 2017 WL 3013252, 3 (2017) ("When a contract requires installment payments, the statute begins to run when each installment is due, unless the lender has and exercises its ability under an acceleration clause to render all payments due at once."); See also *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 209 n.5 (1997) (". . . consistent authority across jurisdictions indicates that, when an acceleration clause is included in a contract and is exercised, the statute of

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limitations does not begin to run until the obligee (i.e., the borrower) defaults on the debt and the obligor (i.e., the lender) exercises the acceleration option. Indeed, the Supreme Court has explained the general rule that '[t]he statute of limitations on an accelerated debt runs from the date the creditor exercises its acceleration option . . .''); See also *United States v. Rollinson*, 629 F. Supp. 581, 584 (D.D.C. 1986), aff'd on other grounds, 866 F.2d 1463 (D.C. Cir. 1989); See also *Greene v. Bursey*, 733 So.2d 1111, 1114-15 (Fla. Dist. Ct. App. 1999) ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not yet due if the holder exercises his right to accelerate the total debt because of a default. In other words, the entire debt does not become due on the mere default of payment; rather, it become[s] due when the creditor takes affirmative action to alert the debtor that he has exercised his option to accelerate."); See also *Dove v. Educap*, 2016 WL 3951059, 4 (2016); See also *In re Bennett Funding Grp., Inc*., 2003 WL 174328, at 10; See also *Windward Bora LLC v. Browne*, 2023 WL 2744684, 9 (2023); See also *U.S. Bank Tr., N.A. v. Adhami*, No. 18-CV-530(PKC)(AKT), 2019 WL 486086, at 4 (E.D.N.Y. Feb. 6, 2019) (Citing *Zucker v. HSBC Bank, USA*, No. 17-CV-2192(DRH)(SIL)); See also *Miss Jones LLC v. Stiles*, 2019 WL 1244945, 5 (2019).

Defendants claims that they rescinded the 2010 Notice of Default in 2019, thereby un-accelerating the debt that occurred pursuant to the Notice of Default. Defendants' Opposition at 8. But a simple reading of the Rescission of Notice of Default shows that it explicitly *did not* do anything other than rescind the right to sell the property pursuant to the Notice of Default. It specified that the trustee "does hereby rescind, cancel, and withdraw said Notice of Default and Election to Sell." Cramer Decl., Ex. 2. However it went on to further specify that it "is and shall be deemed to be only an election without prejudice, not to cause a sale to be made pursuant to said notice so recorded." If the Rescission of Notice of Default is only an election without prejudice not to cause a sale to be made pursuant Notice of Default, it does nothing to rescind the acceleration of the debt that the Notice of Default also accomplished, and the 10-year statute of

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limitations as to (1) in ORS 88.110 expired on September 22, 2020.

As to (2), "the expiration of the term of the mortgage debt", that date was either February 2, 2009, the Date that the grantor received her discharge in bankruptcy, or September 22, 2010 the date that the debt was accelerated. Defendant's Opposition treats the statutory language here with a gentle hand waive; there is no serious engagement with the language and Defendants seem to assert that the statutory language, "the expiration of the term of the mortgage debt" means the same as "the maturity date of the Deed of Trust". Defendants Opposition at 7. As the Defendants rightfully point out, the debt and the Trust Deed creating the lien and securing the debt are separate concepts with separate functions, and bankruptcy alters some of these functions. *Id.* But the Trust Deed *is not* the "mortgage debt" as used in ORS 88.110. The trust deed is an interest in real property that secures the right to repayment. *Bayview Loan Servicing, LLC v. Reed*, 282 Or App 525, 528–29, (2016). The debt is the money that is to be repaid.

While the initial term of the "mortgage debt" was specified in the trust deed to expire on January 1, 2035, the term is not static. As used in ORS 88.110 the word "term" relating to the "mortgage debt" can only logically refer to the period of time that the debt is to be paid.[2] The term can be changed to a different date by the Defendants by acceleration in the case of default, or it can be changed by the grantor to the discharge date of their bankruptcy, ending the term of their personal liability on the debt.

The Defendants' claim that "term of the mortgage debt" won't expire until 2035 is disingenuous. The "debt" hasn't been collectable since 2010, so to say that its "term" continues for another 12 years is just nonsense. If the debt cannot be collected, then its "term" has to have ended. The Defendants are simply incorrect to claim that they had until 2035 to foreclose their trust deed. The latest date that could constitute "the expiration of the term of the mortgage debt" is September 22, 2010, the Grantor's discharge date . Ten years later is September 22, 2020, the latest possible date that the Trust Deed could have been foreclosed.

[2] "Term" in this case means a "limited or definite extent of time." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/term. Accessed June 25, 2023.

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CONCLUSION

The Plaintiff will suffer irreparable harm from the foreclosure of her property. There is no public harm from an injunction, and the balance of equities tips sharply in the Plaintiff's favor because the Defendants have delayed for 14 years. Serious questions go to the merits because under any reasonable reading of ORS 88.110 and the record, Defendants have lost the ability to foreclose their Trust Deed because more than 10 years has passed since the debt has matured and its term has expired.

Without an order for injunctive relief, Plaintiff's attempt to protect her rights in the Property will be moot. Plaintiff respectfully requests that this Court grant this Motion pursuant, thereby preserving the status quo and ensuring the reasonable protection of Plaintiff's possessory rights in the Property during the pendency of this action.

Dated: June 25, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S MEMORANDUM IN SUPPORT OF A PRELIMINARY INJUNCTION on the attorney or party listed below on the date set forth below by the method(s) indicated:

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